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Supreme Court of the United States

October Term, 1954
No. 304

NATIONAL TEXTILE AND MANUFACTURING CO., INC.,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1954

No.

NATIONAL TEXTILE AND MANUFACTURING CO., INC.,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 2, 1954.

Opinions Below

The opinion of the District Court by the Hon. Harold P. Burke is as yet unreported. The opinion of the United States Court of Appeals for the Second Circuit is as yet unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c).

Statement

The Pennsylvania Railroad Company, Respondent, filed its complaint on February 15, 1949, against Max Stabins doing business under the trade name and style of National Supply and Manufacturing Co., to recover for transportation and storage charges, plus interest, in connection with the shipment of two cars of merchandise from two different points in Georgia. The decision of the Trial Court resulted in a judgment for the respondent on January 12, 1954. From this judgment the petitioner appealed, and on June 2, 1954 the United States Court of Appeals for the Second Circuit affirmed the judgment. On June 17, 1954, petitioner filed a petition for rehearing. On June 25, 1954, said petition for rehearing was denied. On July 12, 1954, petitioner applied for an order pursuant to Rule 31 of the Rules of the United States Court of Appeals for the Second Circuit recalling and staying the mandate of that Court pending application to the Supreme Court of the United States for a review on a writ of certiorari. Respondent opposed said application and in addition thereto requested that in the event the Court granted such application to recall and stay the mandate that petitioner be required to post a substantial bond. On July 21, 1954, the United States Court of Appeals for the Second Circuit granted petitioner's application, denied respondent's request for a bond and recalled and stayed its mandate pursuant to Rule 31 of the Rules of the United States Court of Appeals for the Second Circuit.

Facts

This action, brought by the respondent to recover for transportation and storage charges plus interest, concerns itself with the shipment of two cars from different points in Georgia, one car from Grovetown, Georgia, and the other car from Ft. Benning, Georgia. Both cars were shipped under separate bills of lading, each one being the common

and ordinary commercial uniform straight bill of lading. The consignee on each of the bills of lading was the National Supply and Mfg. Co. Neither of the bills of lading designated the petitioner in this action as the consignee. The National Supply and Mfg. Co., the consignee, and the National Textile & Manufacturing Co. Inc., the defendant in this action, are two separate and distinct entities. The former being a company owned by an individual, and the latter, a corporation. At the bottom of the bill of lading with respect to car #37859, the name of the consignor or shipper appears as "Surplus Property Officer, per R. J. Mays. Lt. Col. Q.M.C." At the bottom of the other bill of lading, with respect to car #141415, the name of the consignor or shipper appears as "Per Roy L. Franke, Capt. T. C. Trans. Off." On neither of these bills of lading, does the name of the petitioner in this action appear. Both of these cars were shipped from different places, and as appears from the bills of lading, by transportation officers of the Army, acting for the War Assets Administration. This is evident from a perusal of the bills of lading themselves with respect to both of these cars.

The bills of lading covering each of the cars in question, and both of the shipments, were issued by the original railroad carrier. In neither was there any non-recourse agreement signed, nor was there any provision for prepayment. Plaintiff was the delivering carrier of these shipments.

On arrival in New York City, notice of arrival was sent to the National Supply and Mfg. Co. Thereafter plaintiff tendered delivery of the merchandise subject to the payment of the freight bills for transportation. The defendant refused to accept delivery of these shipments and refused to pay the charges requested. Plaintiff then gave notice to the shipper that the consignee refused to accept delivery of these shipments, and the plaintiff thereupon requested instructions for the disposition of the shipments from the

shipper. No instructions were received. The merchandise was thereafter sold at auction in accordance with the terms of Section 4 of each of the bills of lading contracts covering each specific car.

In this action efforts have been made to saddle this petitioner with the obligation of paying the charges requested by the respondent, when as a matter of fact, this petitioner is neither the consignor nor the consignee. Liability is sought to be attached to this petitioner because it had paid for the goods and was therefore the owner thereof. It is the petitioner's contention that irrespective of this fact, that as a matter of law, under the facts and the evidence as adduced in this case, that there was no liability on the part of this petitioner to pay for any of the charges, the subject of this action.

Questions Presented

1. Does a Straight Bill of Lading on which the owner of the shipment is designated as consignee, but who is not the consignor, in the absence of contractual obligation, or proof of agency in the consignor, create a legal liability on the part of the owner to pay for freight and storage charges with respect to said merchandise?

2. Was the decision of the United States Court of Appeals for the Second Circuit, in relation to shipments of merchandise under Straight Bills of Lading in interstate commerce, and under the facts in this case, in conflict with the controlling decisions of other Circuit Courts and the Supreme Court of the United States, *viz. Southern Pacific Co.* v. *United States,* 192 F. 2nd 438; *Louisville & Nashville R. Co.* v. *Central Iron Co.,* 265 U. S. 59; *Illinois Steel Co.* v. *Baltimore & O. R. Co.,* 320 U. S. 580; *Pittsburg, Cinc. C. & St. L. Ry. Co.* v. *Fink,* 250 U. S. 577; *New York Central & H. R. R. Co.* v. *York & Whitney Co.,* 265

U. S. 406; *Minneapolis & St. Louis Ry. Co.* v. *Columbus Rolling Mill Co.*, 119 U. S. 149.

3. Was the Court of Appeals in error in refusing to sustain the contention of the petitioner, that no contractual obligation having been proven, and no agency having been proven, that there was no basis for charging the petitioner with any liability and that the complaint should have been dismissed?

4. Was the Court of Appeals in error when it affirmed the judgment of the District Court which judgment was predicated on a qualified acceptance when as a matter of law there could be no qualified acceptance in this case?

5. Was the Court of Appeals in error in failing to require that the burden of proving agency was on the respondent, and that never having done so, the requirement inherent in its decision that the burden was on the petitioner to offer evidence to the contrary, was error?

6. Was the Court of Appeals in error in refusing to sustain the contention of the petitioner that under the facts and circumstances of this case, no liability attached to the petitioner for which it could be chargeable or answerable to the respondent?

7. Was the Court of Appeals in error in refusing to reverse the judgment of District Court and to dismiss the complaint as requested by the petitioner?

Reasons for Granting the Writ

The writer respectfully asserts that in the exercise of judicial discretion special and important reasons exist as required by Supreme Court Rule 19 why a review will be granted in that the United States Court of Appeals for the Second Circuit has decided an important question of local law in (a) a way probably in conflict with applicable

local decisions; (b) has decided an important question in Federal law which has not been put should be decided by the Supreme Court; (c) has decided a Federal question in a way probably in conflict with applicable decisions of the Supreme Court.

Referring to point (a) above, the following observations are made:

The United States Court of Appeals covers a part of the United States which is highly populated and is the center of many and varied forms of commerce. Many of these individuals and companies so engaged have a vital interest in interstate commerce and the law applicable thereto.

It is respectfully submitted that every decision affecting interstate commerce and the record upon which the decision of the Court rests, are keenly scrutinized by counsel, either for railroads and other carriers interested in interstate commerce, or counsel for individuals or companies who expend vast sums of money for freight and other charges for merchandise transported and stored in interstate commerce.

The decision therefore, of the United States Court of Appeals in this action, can and will have far reaching effect upon interstate commerce litigation.

It is respectfully submitted that an examination of the record and the decision of the United States Court of Appeals shows that the United States Court of Appeals has decided an important federal question in a way probably in conflict with applicable federal law and decisions.

The question involved in this case was: does a straight bill of lading on which the owner of the shipment is designated as consignee, but who is not the consignor, in the absence of contractual obligation, or proof of agency in the consignor, create a legal liability on the part of the

owner to pay for freight and storage charges with respect to said merchandise?

It is respectfully submitted that prior to this decision, the United States Courts have uniformly held that the obligation to pay freight charges is contractual.

See:

Thompson v. *Texarkana Cotton Oil Corporation,* 54 Fed. 2d 212;

Chicago Great Western Ry. Co. v. *Hopkins,* 48 F. Supp. 60;

Louisville & Nashville RR. Co. v. *Central Iron Co.,* 265 U. S. 59;

In Matter of Transportation Company Material, 22 I. C. C. 439;

In Matter of Bills of Lading, 52 I. C. C. 671-672;

New York Central R. Co. v. *Trans-American Petroleum Corp.,* 108 F. Supp. 2d 994, 129 A. L. R. 206;

New York Central R. Co. v. *Little Jones Coal Co.,* 25 F. Supp. 337;

Lowden v. *Iroquois Coal Co.,* 18 F. Supp. 923.

The character of this decision, as to which review is now sought, would indicate that no contractual obligation is now necessary and that liability is imposed solely by virtue of the fact that a defendant's name appears on a straight bill of lading as the consignee.

Such a finding is in direct conflict with the authorities and the enunciated law in this regard and is in the writer's respectful opinion entirely erroneous.

In the instant case the United States Court of Appeals has failed to follow the law enunciated in the cases hereinbefore referred and under Point I of the defendant-appellant's brief, and such defection the writer believes to be error.

The writer is of the opinion that the law is well settled by the decided cases of our highest tribunal, that the obligation to pay freight charges is contractual and that the liability is primarily on the consignor, except where the bill of lading provides otherwise, which was not the case here, or where other special circumstances exist none of which were present in this case.

The plaintiff failed to prove that the defendant shipped the goods or caused them to be shipped, nor was any testimony offered by the plaintiff or adduced by it on this vital and primary issue. Furthermore plaintiff failed to prove any contract between it and the defendant whereby the defendant agreed to pay the claimed freight and storage charges.

Since there was no proven contractual obligation upon which defendant's liability could be predicated, the plaintiff sought to attach liability on a theory of agency.

In this regard it is interesting to note that no proof of agency as between the transportation officers and the defendant in this case was ever offered nor does there appear one iota of proof with respect to any such agency in the record.

Agency was first mentioned in the summation of the plaintiff's counsel at the trial, which is not a part of the testimony or proof in this case and was thereafter made a basis for his contention in his brief to the District Court before the decision was rendered, because he apparently realized at that time how untenable his position was and had become so far as this defendant was concerned.

So far as any agency was concerned the record is barren of any testimony in this respect. There however appears in the record the language incorporated in the Circuit Court's decision which sets forth a colloquy between the trial judge and the president of the defendant corpora-

tion, to which language the United States Court of Appeals has attributed the finding of an agency sufficient to affirm the judgment of the lower court and to charge the defendant-appellant with liability.

A reading of the language of this colloquy, in the first answer by the witness to the Court, shows that the goods were shipped by the seller itself without any instructions or advice in this regard and without any supervision, direction, suggestion or control by defendant as to the time, manner, or method, or as to the facilities to be used. Surely every purchaser necessarily gives its address to the seller at some time, but in the writer's humble opinion this and the questions and answers of the colloquy do not spell out an agency in the Transportation Officers or in the War Assets Administration for whom they acted upon which legal liability for this shipment could attach to the defendant-appellant.

It is interesting to note in passing that there is no other language anywhere in the record to which any finding of agency could be even remotely construed. It seems to the writer that the United States Court of Appeals has attached too much significance to this colloquy which in the writer's opinion was never intended by either the trial court or the witness to be probative of any question of agency.

It seems to the writer that the only way in which liability could have attached to the petitioner in this case would have been by an acceptance of the merchandise by it. This would have created an implied contract by it to pay all lawful freight and storage charges. This however never happened.

The writer respectfully submits that after intensive study he can find nothing in the pretrial stipulation or the testimony of the defendant's president to show authority given to the army officers to act as defendant's agents. In this regard the facts in both cases of *Southern Pacific Co.*

v. *United States,* 192 Fed. 2d 438 and 93 Fed. Supp. 411, cited in defendant-appellant's brief involved an actual and definite set of facts with respect to shipping instructions (not even existant in this case) by that purchaser to the War Assets Administration and even in those cases there was no finding of any agency, to hold the owner liable, and to relieve the United States Government from the liability which was imposed against it. Those cases also involved shipments by War Assets Administration through Army Transportation Officers, and except for the difference in the merchandise shipped the facts were similar in almost every detail to the facts in the present case, with the additional factor in those cases that actual and definite shipping instructions were given by the purchaser and in those cases there was no finding of agency. It seems to the writer *a fortiori* that no agency should have been found here.

A reading of the decision of the United States Court of Appeals indicates that it felt that the defendant was obligated to produce testimony with respect to the sales contract in order to prove that the army was obligated to pay the freight charges. In the writer's respectful opinion the burden of proving agency was on the plaintiff, and never having done so, the requirement inherent in its decision that the burden was on the defendant to offer evidence to the contrary was error.

Furthermore the District Court in finding judgment for the plaintiff based its decision on a qualified acceptance as the basis for imposing liability on the defendant. Such a finding was impossible as a matter of law. In the first place a "qualified acceptance" is solely the creature of the negotiable instruments law and could not apply in this case since the bills of lading in the instant case were straight bills of lading and non negotiable. See sections 229 and 230 of the negotiable instruments law and section 190 of the personal property law.

See also:

Gubelman v. *Panama R. Co.*, 192 App. Div. 165, 182 N. Y. S. 403.

So far as the general law of contracts itself is concerned, there is no qualified acceptance. There is no recognition given to any so-called qualified acceptance. Under the law of contracts, any qualified acceptance is a rejection. It is the unqualified rule of contracts and has been unequivocally held, that a proposal to accept an offer, if modified, or an acceptance to other terms or conditions than those stated in the offer, is held to be equivalent to an absolute rejection of the offer.

See:

Poel v. *Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 319, 110 N. E. 619;
Wittwer v. *Hurwitz*, 216 N. Y. 259, 110 N. E. 433.
Minneapolis & St. Louis Ry. Co. v. *Columbus Rolling Mill*, 119 U. S. 149, 30 Law Ed. 376, 7 Sup. Ct. Rep. 168.

Here the United States Court of Appeals in effect either overruled or decided this important question of a law in a way probably in conflict with other local decisions for it was unquestionably the duty of this plaintiff to prove agency and the burden of so doing was upon it. Never having done so, the burden never shifted to the defendant to prove the contrary.

A reading of the cases of the *Southern Pacific Co.* v. *United States*, both of which are cited above, indicates that the law and the decisions arrived at in those cases are entirely at variance with the decision here.

Referring to points (b) and (c) above the following observations are made:

So far as the litigation involved in this case is concerned the same involves a federal question.

See:

Illinois Steel Co. v. *Baltimore & O. R. Co.*, 320 U. S. 580;

Georgia, Florida & Alabama Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190, 194, 195, 36 U. S. C. 541, 543, 60 L. Ed. 948;

Chesapeake & Ohio Ry. Co. v. *Martin*, 283 U. S. 209, 212, 213, 51 S. Ct. 453, 455, 75 L. Ed. 983.

This is conceded by the plaintiff in its brief, which incidentally is the only point on which any authorities were submitted in substantiation of its contentions.

It is also the enunciated law that the consignor is primarily liable for freight charges and other charges except where the bill of lading provides otherwise.

See:

Louisville & Nashville R. Co. v. *Central Iron Co.*, 265 U. S. 59;

Southern Pacific Co. v. *United States*, 192 F. 2d 438;

Southern Pacific Co. v. *United States*, 93 Fed. Supp. 411.

The cases of *Southern Pacific Co.* above cited also involved shipments by War Assets Administration through Army Transportation Officers, and except for the difference in the merchandise shipped the facts were similar in almost every detail to the facts in the present case, with the additional factor in those cases that actual and definite shipping instructions were given by the purchaser and in those cases there was no finding of agency. It seems to the writer *a fortiori* that no agency should have been found here.

It is respectfully asserted that one of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions among the Federal Courts of the United States and of the Appellate Courts of the United States.

Various motions to dismiss the complaint were made by defendant's counsel at the end of plaintiff's case all of which appear in the record on pages 332-333 and 334, and which indicate defendant's position as a matter of law at the end of the entire case. These motions in the writer's opinion were fully warranted by the applicable law at the close of the entire case to the testimony submitted, and required a dismissal of the complaint as sought.

So far as the issues which were determined by the jury were concerned the same are irrelevant on this appeal since it is the writer's contention that no liability attached to the defendant-appellant as a matter of law under any interpretation of the facts based on the evidence adduced in this case.

None of the authorities cited in the brief of defendant-appellant and which are herewith reiterated, have been refuted or challenged in the brief and appendix of the plaintiff-appellee, nor has any authority in the decided cases been submitted by it in substantiation of plaintiff-appellee's contentions to sustain its position or to challenge defendant's.

ARGUMENT

POINT I

The obligation to pay freight charges is contractual.

As was stated by the court in the case of *Thompson* v. *Texarkana Cotton Oil Corporation,* 54 Fed. 2d 212, Lemley, District Judge, speaking for the court:

> "I conclude as matters of law the following:
>
> Conclusions Nos. 1-2—The obligation to pay freight charges is a contractual one. With respect to shipments 13 to 26 inclusive the court having found that the defendant was not the shipper, and that no contractual relationship between the plaintiff and the defendant existed, there being no promise express or implied, by the defendant to pay freight charges on these shipments, I conclude that the plaintiff is not entitled to recover any balance of freight charges from the defendant as to these shipments." • • •
>
> "Conclusion No. III—With respect to shipments 1 to 5 inclusive, and 7 to 11 inclusive, in each of which the defendant was the consignor or shipper, the defendant is, by the express terms of carriage, obliged to pay all lawful freight charges due on each of such shipments," • • •."

It is obvious from a reading of the bills of lading that no contract was ever entered into between either the originating carrier or the terminal carrier (the plaintiff in this case), and the defendant, by virtue of which any obligation in contract could be imposed upon the defendant herein. That the defendant was never a party to the agreement, and nothing appears in the proof or in the record, to sup-

port any obligation on the part of the defendant. The transportation officers in this case who signed the bills of lading, were acting as agent for the War Assets Administration. There is nothing in the contract itself, which would make the defendant a party to it, so as to impose any liability on it.

As was stated by the court in the case of *Chicago Great Western Ry. Co.* v. *Hopkins*, 48 F. Supp. 60, Nordbye, District Judge, speaking for the court:

> "• • • It is clear that the shipper may by contract with the carrier, absolve himself from any liability for freight charges, whether such charges are those which are initially computed or by way of an undercharge subject to the rule which prohibits discrimination. That is, the law is satisfied if someone is made liable for the freight charges, and if the consignee is made solely responsible therefor under the contract the law is not contravened."

Louisville & Nashville R. Co. v. *Central Iron Co.*, 265 U. S. 59;
In the Matter of Transportation Company Material, 22 I. C. C. 439;
In Matter of Bills of Lading, 52 I. C. C. 671-672;
New York Central R. Co. v. *Trans-American Petr. Corp.*, 108 F. 2d 994, 129 A. L. R. 206;
New York Central R. Co. v. *Little Jones Coal Co.*, 25 F. Supp. 337;
Lowden v. *Iroquois Coal Co.*, 18 F. Supp. 923.

Had the defendant accepted delivery of this merchandise from the plaintiff, there would have arisen by virtue of such acceptance and solely by virtue thereof, an implied contract on the part of the defendant to pay all lawful transportation charges of every character.

Pittsburgh C. C. & St. L. Ry. Co. v. *Fink*, 250 U. S. 577.

As was stated by the court in the case of *Pittsburgh C. C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577, Mr. Justice Day speaking for the court:

> "Examination shows some conflict of authority as to the liability at common law of the consignee to pay freight charges under the circumstances here shown. The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier."

Even in a case where a non-recourse clause has been signed in a bill of lading by a shipper or consignor, the contract obligation with respect to the bill of lading being one between a consignor and the carrier, no liability under that contract would attach to the consignee, except where delivery of the merchandise was accepted by such consignee under the contract which the consignor and the carrier entered into. Only then would the consignor be relieved of his obligation under the contract. The theory of the consignee's obligation being that having accepted the merchandise, he has thereby created an implied contract with the railroad to pay all lawful charges, and by virtue of the non-recourse clause and the consignee's acceptance under the contract made by the consignor with the railroad, the consignor would thereafter be relieved from liability. In this case there was no acceptance of any kind by the defendant or the consignee of any of the merchandise, the subject of this action, upon which any contractual obligation or liability could be predicated.

As was stated in the case of *Chicago Great Western Ry. Co.* v. *Hopkins*, 48 F. Supp. 60, Nordbye, District Judge, speaking for the court:

> "• • • In other words, it is fair to assume that the parties intended that any lawful charges in addition to those paid must be collected from the con-

signee if delivery was accepted by such consignee under the contract which the consignor and the carrier had entered into * * *. This construction squares not only with the apparent interest of the parties, but does not violate the rights of the consignee. The latter upon receipt of the freight, was informed that there would be no recourse on the consignor for any freight charges or other lawful charges in addition to that which had been paid. The consignee therefore accepted the shipment with knowledge that he alone must respond for any deficiency in the freight charges. *Pittsburgh C. C. & St. L. Ry. Co.* vs. *Fink, supra.* It is my opinion, therefore, that the 'no recourse' contract entered into between the consignors and the carrier discharged the consignors from any claim of undercharges after the shipment has been received and accepted by the consignee under the uniform bill of lading as executed herein."

See also *New York Central R. Co.* v. *Trans-American Petroleum Corp.*, 108 F. Supp. 2d 994, 129 A. L. R. 206.

POINT II

The court erred in holding that the consignor was acting as agent for the defendant.

Although there was no proof of agency of any kind on the trial or in the record, the memorandum of the plaintiff's attorney, and some of the statements contained therein, apparently misled the lower court into believing that there was an agency existing, when in fact none existed. Plaintiff's memorandum contained a statement to the effect that the defendant, although not so designated, was the shipper or consignor, and that the Surplus Property Officers, when

signing the bills of lading, acted, not on behalf of the War Assets Administration, but on behalf of the defendant.

The case of *Southern Pacific Co.* v. *United States,* 93 Fed. Supp. 411, in the District Court, and the case of *Southern Pacific Co.* v. *United States,* 192 F. 2nd 438, in the Circuit Court of Appeals, and various of the other authorities hereinafter set forth, definitely refute any such contention, as do the bills of lading themselves, which do not in anywise so indicate.

As a matter of fact, the courts have held in both of the aforementioned *Southern Pacific Co.* cases v. *United States,* where there existed a similar and almost identical situation to the bills of lading and the circumstances in this case, that the transportation officers were the agents of the United States Government, and not of the consignee.

How much more difficult would be any attempt to make these transportation officers the agents of the defendant, whose name does not even appear as the consignee on these bills of lading.

No proof of any agency as between the transportation officers and the defendant in this case was ever offered, nor does there appear one iota of proof with respect to any such agency in the record. Agency was first mentioned in the summation of the plaintiff's counsel at the trial, which is not a part of the testimony or proof in the case, and was thereafter made a basis for his contention in his brief to the court before the decision was rendered, because he apparently realized at that time how untenable his position was and had become so far as this defendant was concerned.

The owner of goods should not be required to pay freight rates and charges which it never incurred, and which involve a very substantial loss to it, merely because a non-agent consignor shipped the same.

Plaintiff has utterly failed to prove that the consignor did not act for itself, and that it was the agent of the defendant.

POINT III

The court erred in holding that the defendant being the owner of the goods, as such, it is liable under the provisions of the bills of lading.

Great moment of the word "ownership" was made in the memorandum of the plaintiff to the lower court prior to its decision. From the use of this word and by various statements not in anywise supported by authority, the lower court was asked to impute to this ownership a liability for which this defendant should be saddled with the plaintiff's claim. This the lower court apparently did in finding a judgment for the plaintiff against this defendant, in spite of the fact that no contractual obligation of any kind was ever proven, nor was any testimony either offered or adduced upon which any liability by this defendant could be predicated. Nothing was ever offered or adduced as proof to in anywise prove that the defendant had shipped the goods, or caused them to be shipped. How the court could find a liability on the part of this defendant, predicated upon a finding of ownership, without anything in addition thereto, the writer is at a loss to understand.

It is further interesting to note that no authorities of any kind were either offered by the plaintiff's attorney or indicated in the court's decision to substantiate in anywise its finding of liability, predicated upon so-called ownership.

The authorities and the law, definitely indicate that the liability in this case for the charges claimed by the plaintiff, was on the consignor, and that the finding of a liability by the court on the part of this defendant, for such charges was undoubtedly error.

An owner can be liable only on the basis of a contract between it and the plaintiff, or on the basis of a proven agency. Here there was neither.

In addition the consignee is only liable if it accepts the goods. Here the defendant was not the consignee, and furthermore even were the defendant the consignee there was no acceptance. The tender of goods for shipment by a consignor does not make the consignor the agent of the owner of the goods.

POINT IV

The court erred in holding that the defendant exercised dominion over the shipments amounting to a qualified acceptance by tendering lesser freight charges, and that thereby it is liable under an implied agreement to pay the charges lawfully due.

That each of the bills of lading in this case was a uniform commercial straight bill of lading. As such they are non-negotiable.

Section 190 of the Personal Property Law of the State of New York, referring to uniform bills of lading, and defining a non-negotiable or straight bill, states as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill."

Both of the bills of lading in this case were consigned to a destined or specified person, to wit, National Supply and Mfg. Co., and as such, are straight bills of lading, and are unquestionably non-negotiable. *Gubelman* v. *Panama R. Co.*, 192 App. Div. 165, 182 N. Y. S. 403.

Before any findings could be made by the court of a so-called qualified acceptance, upon which qualified acceptance in turn it would predicate liability on this defendant,

it must necessarily have found as a fact that the bills of lading in this case were negotiable instruments. This is mandatory, by virtue of the fact that the only provision for a qualified acceptance, which is a special creature of the Negotiable Instruments Law, appears in the Negotiable Instruments Law of the State of New York under Section 229 thereof, and the rights of parties to a so-called qualified acceptance are limited solely by the provisions of Section 230 of the said Negotiable Instruments Law.

The bills of lading in this case, being non-negotiable, there could be no basis for finding a so-called qualified acceptance as the basis for imposing liability on this defendant. Even were the bills of lading in this case negotiable, which they are not, there could be no finding of a qualified acceptance here, since the plaintiff did not act in any fashion to evidence any taking or acceptance by them of any so-called qualified acceptance and as provided under Section 230 of the Negotiable Instruments Law.

So far as the general law of contracts itself is concerned, there is no qualified acceptance. There is no recognition given to any so-called qualified acceptance. Under the law of contracts, any qualified acceptance is a rejection. It is the unqualified rule of contracts and has been unequivocally held, that a proposal to accept an offer, if modified, or an acceptance to other terms or conditions than those stated in the offer, is held to be equivalent to an absolute rejection of the offer. *Poel* v. *Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 319, 110 N. E. 619.

Such a proposal is, in effect, a counter offer, which in order to ripen into a contract, must be accepted by the party making the original offer. *Witter* v. *Hurwitz*, 216 N. Y. 259, 110 N. E. 433; *Seventeen West Fifth Street Corp.* v. *Tolerton*, 107 Misc. 609, 177 N. Y. S. 897.

An offer which has been rejected by a counter proposition loses its vitality and cannot be revived by a subsequent acceptance. *Minneapolis & St. Louis Ry. Co.* v. *Columbus*

Rolling Mill Co., 119 U. S. 149, 30 Law Ed. 376, 7 Sup. Ct. Rep. 168; *Shaw* v. *Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W. 431, L. R. A. 1915 D 145.

In the *Minneapolis & St. Louis Ry Co.* v. *Columbus Rolling Mill Co.* case, *supra*, the defendant offered the plaintiff 2,000 to 5,000 tons of iron rails on stated terms. The plaintiff, in reply, ordered 1,200 tons, which the defendant refused to deliver. The plaintiff then ordered 2,000 tons in compliance with defendant's original offer, but the court held that, in effect, the plaintiff had rejected defendant's offer and could not thereafter accept.

From a reading of the aforementioned authorities it is obvious that the court erred in finding that the defendant exercised dominion over the shipments, amounting to a qualified acceptance, by tendering lesser freight charges, and that it was liable thereby under an implied agreement to pay the charges lawfully due.

The refusal of the defendant to pay the charges sought by the plaintiff could constitute no qualified acceptance, and its refusal to pay any amount other than as tendered by it, directly contradicts and militates against any implied agreement on its part to pay any other freight charges as sought by plaintiff, and which charges were never incurred by the defendant.

POINT V

The defendant never agreed to pay either the plaintiff's freight or storage charges.

Although the plaintiff sues the defendant for freight and storage charges, the plaintiff has failed to prove that the defendant shipped the goods or caused them to be shipped. Absolutely no testimony was offered or adduced on this vital and primary issue. Plaintiff did not prove any contract between plaintiff and defendant, whereby de-

fendant agreed to pay the claimed freight and storage charges.

The writer is of the opinion that this court will undoubtedly fail to find any obligation on the part of this defendant to pay freight and other charges incurred by the act of the consignor, who was no agent of the defendant, and by this act incurring liability attributable to the defendant in excess of the resale price of the goods, merely because the consignor shipped the goods under bills of lading.

Only where defendant or his agent sends goods, can it be presumed or implied that the defendant agrees to pay the lawful freight charges, or where the defendant accepts delivery of the goods. None of these facts exist in the case at bar. In the case at bar, the defendant is the wrong party defendant. The consignor should have been made the party defendant.

POINT VI

There was never any acceptance of the goods by the defendant and in order to charge it with liability; nor was it the consignor.

The record indicates that there was never any acceptance of the goods by the defendant. The plaintiff recognized this when it advised the shipper, the consignor in this case, of the defendant's refusal to accept the goods.

Had the defendant accepted the goods, under the authorities of the decided cases, many of which appear in Point VIII hereinafter of the writer's brief, such acceptance would have spelled out an implied contract on the part of the defendant, upon which could be predicated a liability which would charge it with the payment of all lawful charges in connection with said shipments. The

defendant never having accepted this merchandise, which fact is unquestioned, it follows that no liability can be predicated upon such refusal.

Nothing in the record has indicated the defendant to be the consignor. Plaintiff's attorney recognizes this fact and in his memorandum of law to the lower court, stated that although the defendant was not so designated, that it was the shipper or consignor, and that the Surplus Property Officers, when signing the bills of lading, acted not on behalf of the War Assets Administration, but on behalf of the defendant. Such wishful thinking is not supported by the facts and should not be found as a matter of law. Having recognized the weakness of his position, plaintiff's attorney now attempts, not by testimony, but by invoked language, to create a situation which factually does not exist. The writer does not believe that this will impress this court in contradiction of the true facts as they actually exist.

POINT VII

The construction of the clauses of a bill of lading adopted by the Interstate Commerce Commission and prescribed by Congress for interstate rail shipments, presents a Federal question.

Georgia Florida & Alabama Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190, 194, 195, 36 S. Ct. 541, 543, 60 L. Ed. 948;
Chesapeake & Ohio Ry. Co. v. *Martin*, 283 U. S. 209, 212, 213, 51 S. Ct. 453, 455, 75 L. Ed. 983.

As was stated by the court in the case of *Illinois Steel Co.* v. *Baltimore & O. R. Co.*, 320 U. S. 580, Chief Justice Stone speaking for the court:

> "Since the clauses of the uniform bill of lading govern the rights of the parties to an interstate shipment and are prescribed by Congress and the Commission in the exercise of the commerce power, they

have the force of federal law and questions as to their meaning arise under the laws and the Constitution of the United States. Hence we have jurisdiction to review their determination by the state courts, in a suit by the carrier to recover freight charges."

POINT VIII

Where the bills of lading are of the character as are involved in this case, the law is well settled that the obligation for freight charges is on the consignor, unless other special circumstances exist, none of which are present in this case.

As was stated in the case of *Illinois Steel Co.* v. *Baltimore & O. R. Co.*, 320 U. S. 580, Chief Justice Stone speaking for the court:

> "Section 7 of the conditions of the uniform bill of lading provides that the owner or consignee shall pay the freight and all other lawful charges upon the transported property, and except in those instances where it may be lawfully authorized to do so, that no railroad carrier shall deliver or relinquish, at destination, possession of the property covered by the bill of lading until all tariff rates and charges have been paid. Cf. 3(2) of the Interstate Commerce Act as amended, 49 U. S. C. 3(2), 49 U. S. C. A. 3(2). But it further provides that
>
> 'The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. * * * Nothing herein shall

limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. * * *

'Under these provisions if the non-recourse clause is not signed by the consignor, he remains liable to the carrier for all lawful charges. The carrier is free to demand payment in advance by the consignor, or it may decline to make delivery to the consignee until the freight charges are paid or guaranteed, or if delivery is made to the consignee without payment, the consignee is also liable for all freight charges.

'But if the non-recourse clause is signed by the consignor and no provision is made for prepayment of freight, delivery of the shipment to the consignee relieves the consignor of liability.

Louisville & N. R.R. Co. v. *Central Iron Co.*, 265 U. S. 66, note 3, 44 S. Ct. 442, 68 L. Ed. 900,

and acceptance of the delivery establishes the liability of the consignee to pay all freight charges.

Pittsburgh Cinc. C. & St. L. Ry. Co. v. *Fink*, 250 U. S. 581-583, 40 S. Ct. 27, 63 L. Ed. 1151;
New York Central & H. R.R. Co. v. *York & Whitney Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 510, 65 L. Ed. 1016."

Obviously where as in the case at bar neither the owner nor its agent shipped the goods, the same principle would apply, and the owner could not be held liable unless he accepted the goods.

In addition the court further stated:

"In the light of these long established rules of liability * * *

'The obvious purpose and effect of the non-recourse clause is to relieve the shipper from liability for freight charges, upon delivery to the consignee.

Such a purpose is consistent with an intention that in case of prepayment of a portion of the freight charge, the carrier should after delivery, look to the consignee for the remainder of the charge. Since by the uniform bill of lading, the parties to a rail shipment are left free to relieve the consignor from liability by their contract, such an arrangement would be within their competence and would release the consignor from liability to the extent of the unpaid freight charges.

'It could not be said that by agreeing to pay a part of the charges in advance, the consignor has agreed to pay more, or that the non-recourse clause would cease to be effective as to the unpaid charges because the consignor had paid or undertaken to pay part of them. The words of Sec. 7 of the conditions of the bill of lading are to the effect that if the consignor stipulates that the carrier shall not deliver "without requiring payment of such charges" and the carrier makes delivery, the consignor "shall not be liable for such charges." In this context "such charges" are the lawful charges which the consignor has not paid or stipulated to pay in advance. • • •

'This construction does not leave the carrier unprotected with respect to the collection of unanticipated freight charges, for it may always insure their collection by demanding the consignor's guarantee of all charges, pursuant to Sec. 7 of the conditions of the uniform bill of lading, a provision which presupposes that the prepayment of freight clause is not as broad as the authorized guarantee."

See also:

Louisville & N. R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59;

Southern Pacific Co. v. *United States*, 93 Fed. Supp. 411, aff'd 192 Fed. 2d 438.

POINT IX

Under the facts in this case no liability could attach to the defendant, even under an implied contract, as delivery of the goods were never accepted by it.

A reading of the cases cited as authority by the writer under Points I and VIII of this memorandum, which concern themselves with Point IX as set forth herein, are all agreed that where an implied contract could be spelled out against a consignee in a transaction between a consignor and a carrier under a bill of lading, that the essence and the sole basis of this implied contract is the acceptance of the merchandise by the consignee. In this case, the merchandise in question was never accepted by the consignee or the defendant herein.

The writer does not want to burden this court with a repetition of the citations in Points I and VIII hereinbefore set forth, but respectfully refers this court to the citations therein contained as authority for Point IX and as indicated.

It is interesting to further note in passing that both of the bills of lading upon which the plaintiff predicates its claim against this defendant, show the National Supply & Mfg. Co. as the consignee. The defendant who has been sued in this case and from whom damages are sought in connection with these two shipments, is the National Textile & Manufacturing Co. Inc. These are two different entites, one being a company owned by an individual, and the other a corporation. Upon what far fetched theory of contractual obligation this carrier assumes to predicate liability against the corporate defendant under a bill of lading directed to an individual company and another entity, this writer is at a loss to understand.

POINT X

Where Federal Government in shipping goods selects ordinary commercial bills of lading rather than Government bills of lading, Government stands in same position as any other shipper as regards liability for freight.

As was stated by the court in the case of *Southern Pacific Co.* v. *United States,* 93 Fed. Supp. 411, aff'd 192 F. 2d 438, Leahy, Chief Judge, speaking for the court:

> "• • • The trailers in suit, though they need not have been, were shipped on ordinary commercial bills of lading. It follows the ordinary shipping rules are applicable to them. The government when it selects the use of such a bill of lading stands—at least should stand—in the same position as any other shipper. This conclusion is enforced by the circumstances that the government may use, if it so desires, a special type of bill of lading and, under such circumstances receive special treatment. The government had it desired special treatment in the instant case could have inserted additional specific provisions in the bills of lading which would have relieved it of the liability it now faces, but this it failed to do."

POINT XI

Consignor is primarily liable for freight charges and other lawful charges except where bill of lading provides otherwise.

No proof of any kind was adduced by the plaintiff to indicate in anywise that it has exhausted its remedies against the United States or the War Assets Administration, who are the parties primarily liable under these bills of lading, nor did the plaintiff, as was incumbent upon it, indicate any inability to collect from the United States or the War Assets Administration, the charges which are here sought. This, as the court well knows, is mandatory insofar as the primary obligor is concerned, and this must be shown even were this a case where the defendant herein could be held secondarily liable, which is not the fact here.

As was stated by the court in the case of *Louisville & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900, Mr. Justice Brandeis delivering the opinion of the court:

> "To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract. Ordinarily the person from whom the goods are received for shipment assumes the obligation to pay the freight charges, and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability on the consignee; for the shipper is presumably the consignor, the transportation ordered by him is presumably on his own behalf, and a promise by him to pay therefore is inferred (that is, implied in fact) as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other

contracts. It may be shown by bill of lading or otherwise, that the shipper of goods was not acting on his own behalf; that this fact was known to the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever therefore, or that he should assume only a secondary liability."

So far as the instant action is concerned, the contract as represented by the bill of lading was between the transportation officers of the Army and the carrier. This contractual obligation was not rebutted in anywise by all of the requirements as hereinbefore indicated in the decision aforementioned, nor was the carrier familiar with the term of any agreement as between the War Assets Administration and this defendant, if in fact such contract existed.

The testimony of the plaintiff's witnesses with respect to the bills of lading and the shipments as made, was that they knew nothing about the sale of the merchandise or the terms of sale; but that merchandise had been delivered to them designated as haversacks for subsequent shipment to New York by railroad freight. That was all of the knowledge which they had concerning any of the transactions involving the sale of the goods in question. Predicated upon the authority of the aforementioned cases, and upon the authority of the case of the *Southern Pacific Co.* v. *United States,* 93 Fed. Supp. 411, and the subsequent appeal in that case in the United States Circuit Court of Appeals, 192 Fed. 2d 438, how can it be said that any claim for liability could be predicated by this carrier against the defendant or attached to it.

Some moment has been made of the fact that the goods were paid for. This in and of itself, under the authorities as herein indicated and without any knowledge thereof on the part of the carrier at the time of the shipment and

under the conditions as indicated in the foregoing authority, could not be the basis of any right or claim by the carrier to predicate liability against the defendant when it refused to accept delivery of the merchandise in question.

See:

Southern Pacific Co. v. *United States,* 93 Fed. Supp. 411.

Also:

Southern Pacific Co. v. *United States,* 192 Fed. 2d 438.

POINT XII

Where Army transportation officers had charge of shipping obsolete Army equipment sold by War Assets Administration, officers had "incidental authority" to make contract with carrier.

As was stated by the court in the case of *Southern Pacific Co.* v. *United States,* 192 Fed. 2d 438, Circuit Judge Goodrich, speaking for the court, stated:

> "Our view is that Lt. Wilson's authority to make this particular contract may be properly described as 'incidental authority'. This is defined in the Restatement of Agency, Sec. 51 in the following language:
>
> 'Unless otherwise agreed, authority to make a specified contract includes authority:
>
> '(a) to make it in a usual form and with usual terms or, if there are no usual forms or terms, in an appropriate way; and
>
> '(b) to do other acts incidental to its making which are usually done or which, if not usually done, are reasonably necessary for making it.' " • • •

"The record does not reveal that War Assets limited Lt. Wilson's authority to any particular type of shipping contract. In the absence of such limitation, his authority to contract includes any reasonable manner of carrying out the order he did receive, namely, to ship the goods to Kritzer by railroad freight. This is authority implied in fact and not authority implied in law."

We undoubtedly have a similar situation in this case, with the War Assets Administration having designated this shipment to be made by railroad freight and the transportation officers having arranged for this shipment in the manner in which they did.

POINT XIII

The failure of the transportation officers to designate the War Assets Administration or the United States as the principal on the bills of lading, does not relieve them of liability.

As was stated by the court in the case of *Southern Pacific Co.* v. *United States,* 192 Fed. 2d 438, Goodrich, Circuit Judge, speaking for the court:

"One further problem arises from the fact that Lt. Wilson did not name the United States as principal on the bill of lading. In the blank space provided for designating the shipper we find only the words '1st Lt. Robert W. Wilson T.O.'

Lt. Wilson was clearly acting in his representative capacity as a transportation officer for the United States. In view of the fact that this property was being shipped from a United States Military Depot, that it was military property and was shipped

by an Army Transportation Officer; the only reasonable conclusion is that both the lieutenant and the carrier understood the shipper to be the United States. The rule applicable is stated in the Restatement of Agency Sec. 149 as follows:

> 'A disclosed or partially disclosed principal is subject to liability upon an authorized contract in writing, if not negotiable or sealed, although it purports to be the contract of the agent, unless the principal is excluded as a party by the terms of the instrument or by the agreement of the parties.' "

The case of the *Southern Pacific Co.* v. *United States,* 93 Fed. Supp. 411, in the District Court, and the case of the *Southern Pacific Co.* v. *United States,* 192 Fed. 2d 438, in the Circuit Court of Appeals, were both cases almost exactly similar in every detail to the case at bar, with the exception that the material involved in those cases were trailers, where in this case, the merchandise was haversacks.

In both those cases, the District Judge and the Judges of the Circuit Court of Appeals, in well reasoned decisions held the United States liable for the freight charges. So far as any liability for the freight charges, the subject of this action, is concerned, under the authorities as hereinbefore indicated, the liability in this case should also have been that of either the War Assets Administration or the United States Government, both of whom are of sufficient financial responsibility to respond to the plaintiff in damages, and that at no time was there any liability on the part of this defendant to this plaintiff for any sums claimed by it, and that defendant's motions made at the close of the trial to dismiss plaintiff's complaint should have been granted.

It is respectfully submitted therefore that the United States Court of Appeals for the Second Circuit was in

error in affirming the judgment of the Trial Court, and that the judgment should be reversed and the complaint dismissed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: August 18, 1954.

Respectfully submitted,

IRVING RODIN,
Counsel for Petitioner,
225 Broadway,
New York, N. Y.

APPENDIX

Opinion of Burke, *D. J.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-Appellee,

v.

NATIONAL TEXTILE N MFG. CO., INC.,
Defendant-Appellant.

CONBOY, HEWITT, O'BRIEN & BOARDMAN, New York, N. Y., Attorneys for Plaintiff.
IRVING RODIN, New York, N. Y., Attorney for Defendant.

Defendant was the owner of the goods at the time of their acceptance for delivery by the carrier and at the time of their arrival in New York. In tendering the goods for shipment the consignor was acting as agent for the owner. As such owner it is liable for freight, storage charges and expenses of sale under the provisions of the bills of lading.

Moreover the defendant exercised dominion over the shipments amounting to a qualified acceptance of the goods by tendering to the plaintiff freight charges for the shipments, even though the tedner involved charges which were less than lawfully required under applicable tariffs. This was in effect an implied agreement to pay the charges lawfully due.

Defendant's motion to dismiss the complaint is denied. Plaintiff's motion to dismiss the counter-claim is granted. Judgment in plaintiff's favor against the defendant is directed for the amount of $2737.23, with interest from May 26th, 1947, and taxable costs.

It is hereby so ordered.

HAROLD P. BURKE,
U. S. District Judge.

January 5, 1953.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 119—October Term, 1953

(Argued April 6, 1954 Decided June 2, 1954)

Docket No. 22807

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-Appellee,

v.

NATIONAL TEXTILE N MFG. CO., INC.,
Defendant-Appellant.

Before:
CHASE, *Chief Judge*, and SWAN and FRANK, *Circuit Judges.*

Appeal from a judgment entered by the United States District Court for the Southern District of New York, Judge Burke. AFFIRMED.

CONBOY, HEWITT, O'BRIEN & BOARDMAN (F. SHERWOOD ALEXANDER, of counsel) for plaintiff-appellee.

IRVING RODIN for defendant-appellant.

The plaintiff sued for freight and storage charges on two shipments of goods from points in Georgia to New York City. The pre-trial order shows that defendant stipulated it was the owner and consignee of the goods. At the trial, defendant's president testified that, on behalf of defendant, he had bought the goods in Georgia from the United States Army, had paid for them, and had told the Army officers from whom defendant had there bought the goods, to ship them to defendant at its address in New York City.[1] The bills of lading, signed by Army officers, named defendant as consignee and stated that address; they described the goods as haversacks. When notified by plaintiff of their arrival at New York City, defendant had refused to accept them at the rates for haversacks. But defendant had offered to accept them and pay the very substantial lower freight charges if classified as "scrap." The plaintiff had rejected this offer. Subsequently, defendant's lawyer wrote defendant a letter which stated: "In view of the fact that these haversacks were purchased by my client as scrap and because he feels that any other rating or classification other than a scrap classification is unwarranted and unjustified, he has refused acceptance of the shipment on the basis of paying freight charges for the same with the classification as haversacks and not as scrap."

---

[1] The trial judge showed the bills of lading to this witness, and the following colloquy occurred:

"The Court: These are the shipping bills, and on the shipping bills, as I understand it, the information as to the consignee was obtained from the purchaser, and is from you, wasn't it?

"The Witness: We paid for those goods. They shipped it themselves.

"The Court: You bought them?

"The Witness: National Textile bought them.

"The Court: National Textile?

"The Witness: Yes.

"The Court: And you gave them your address as to where to ship them to?

"The Witness: That is right."

On due notice to defendant, plaintiff sold the goods and applied the proceeds in reduction of the freight and storage charges.

The issues formulated in the pre-trial order were as follows: "(1) Was the defendant justified in refusing to accept the goods tendered and classified as haversacks? (2) Were the goods properly classified as haversacks or were they in fact scrap? (3) Did plaintiff dispose of these goods within a reasonable time after a refusal to accept by the plaintiff? (4) If so, was defendant damaged thereby and to what amount?" These issues were left to the jury in a charge to which defendant took no exception. The jury returned a verdict for plaintiff. Defendant appeals from the judgment entered on the verdict.[2]

FRANK, *Circuit Judge*:

We see no merit in this appeal. The evidence amply supports the verdict. The pre-trial stipulation and the testimony of defendant's president fully answer defendant's argument that defendant did not authorize the army officers to act as defendant's agents in shipping the goods to defendant at its New York address. Moreover, the letter from defendant's lawyer to plaintiff shows that defendant did not refuse to pay the demanded charges on the ground that the shipments were not authorized by defendant but solely because of the asserted error in the classification. As defendant made no effort to prove the contents of the sales contract, it is in no position to assert that the contract obligated the army to pay the freight charges; nor did defendant's president, in his testimony, so much as whisper that the contract so provided.

AFFIRMED.

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[2] Defendant had pleaded a counterclaim which the judge dismissed. On this appeal, defendant does not assert any error in this respect.

FILED
SEP 1[illegible] 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 304

NATIONAL TEXTILE AND MANUFACTURING CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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F. SHERWOOD ALEXANDER,
Of Counsel.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York is reported in 213 F. 2d 466. The opinion of the United States District Court is unreported.

The petition should be denied for the reason that the questions alleged to be presented are not involved in this cause

The first question stated in the petition (Petition, p. 4) is whether the owner and consignee of a shipment is liable for freight and storage charges, in the absence of either a contractual obligation or proof that the consignor was acting as the agent of the owner consignee in making the shipment.

The question is not involved in this case.

Both of the courts below found that petitioner, the owner who was also the consignee, had authorized the consignor to make the shipments and that the army officers tendered the goods to the carrier as agents for the petitioner (Petition, pp. 36, 38-39). The petitioner was found to be not only the owner and the consignee, but also was adjudged to stand in the shoes of the consignor. The question of liability in the absence of proof of the agency is accordingly not presented.

If this court should decide to go behind the above findings, it would be seen, even in the absence of a transcript of the testimony, that the said determinations are amply supported by the evidence.

A statement of the facts will be found in the opinion of Circuit Judge Frank (Petition, pp. 38-39).

The respondent sued for freight and storage charges on two shipments of merchandise from points in Georgia to New York City, alleging that the petitioner had caused the goods to be tendered to the initial carrier for such transportation (Appendix of Plaintiff-Appellee, pp. 2a; 3a). Petitioner's president testified at the trial that he bought the goods on behalf of petitioner from the United States Army, paid for them, and gave the Army officers,

from whom he bought the goods, petitioner's New York City address "as to where to ship them to" (Petition, p. 38). This is not a case in which a party's name had been written in the bill of lading as consignee without his knowledge or consent. Petitioner stipulated in this case that it was the consignee;* it likewise stipulated that it was the owner (Appendix of Plaintiff-Appellee, p. 6a). The Army officers wrote into the bill of lading petitioner's New York City address as the destination, classified the goods as "haversacks" and tendered them to the initial carrier for transportation.

When notified by respondent of the arrival of the goods in New York, petitioner refused to pay the freight charges for that classification but tendered payment at the lower rate for scrap, and demanded delivery. Respondent rejected the tender. Subsequently petitioner's counsel wrote respondent** a letter which stated: "In view of the fact that these haversacks were purchased by my client as scrap and because he feels that any other rating or classification other than a scrap classification is unwarranted and unjustified, he has refused acceptance of the shipment on the basis of paying freight charges for the same with the classification as haversacks and not as scrap."

On due notice to petitioner, respondent sold the goods and applied the proceeds in reduction of the freight and storage charges, and instituted this suit. Petitioner pleaded as a counterclaim that the refusal of respondent to deliver

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* There seems to have been some mixup with respect to the name of the petitioner as apparently its president had carried on his business under two separate but similar names, one of which was a corporation and the other was not. This problem was solved by stipulation (Appendix of Plaintiff-Appellee, p. 3a).

** This letter is erroneously stated on page 38 of the petition as from defendant's attorney to defendant but is correctly stated as sent to plaintiff on page 39. Both references are correctly set forth in the official report, *Pennsylvania Railroad Company* v. *National Textile and Manufacturing Company*, 213 F. 2d 466, 467.

the goods to petitioner upon its demand and tender resulted in the damages which it claimed (Appendix of Plaintiff-Appellee, p. 5a). Issues were formulated in a pre-trial order. Questions were submitted to the jury and a charge given to which petitioner made no exception. The jury resolved the questions submitted to it in favor of the respondent railway company, for whom judgment was entered. Petitioner appealed.

The petition repeatedly cites a case (Petition, pp. 4; 9-11; 18; 32-34) in which it was held that Army officers, who had been given authority to sell surplus goods f.o.b. destination, had under the facts of that case implied authority to act as agents for the government in shipping the goods to the said destination. There the duty of shipping the goods was upon the government and accordingly little evidence was required to show that the Army officers were acting with implied authority from the government. It was not so in the instant case. The goods in Georgia had been bought from the Army officers and paid for. The only person interested in their shipment to New York was petitioner, the owner. The shipment was made for its sole benefit. It is not surprising when petitioner's president, having bought the goods, gave the Army officers the petitioner's address "as to where to ship them to" (Petition, p. 38), that the Army officers understood that petitioner was authorizing them to make the shipment on its behalf as well as for its benefit. Their understanding is shown by the fact that they delivered the goods to the railroad company for transportation to petitioner in New York. The letter of petitioner's counsel shows that petitioner did not refuse to accept the goods on the ground that the shipments were not authorized by petitioner, but solely because of the asserted error in the classification. The trial court understood from the testimony that the petitioner had authorized the shipment of the goods. The Court of Appeals understood from the evidence before it that the petitioner had au-

thorized the shipment, as is shown by its opinion. Both tribunals found proof of agency on evidence they deemed sufficient. It is difficult to see how anyone could have reached a different conclusion. Both courts decided that the petitioner was the owner and the consignee, and that the consignor was its agent.

Accordingly there is no question in this case as to the liability of an owner and consignee "in the absence of * * * proof of agency in the consignor." Such proof was not absent. Hence petitioner's proposed question 1 is not involved in the case.

The second question also is based on the "facts in this case," that is, upon petitioner's claim of the non-existence of proof of the agency of the consignor. Questions 3, 5 and 6 fall for the same reason (Petition, pp. 4, 5).

The fourth question (Petition, p. 5) is whether the Court of Appeals was in error in affirming the judgment of the district court, which was alleged to have been predicated on a qualified acceptance.

This question is also based upon an erroneous assumption. The district court found, as we have seen, that in making the shipments, the consignor was acting as agent for the petitioner who was also the owner and consignee and was accordingly liable for the freight charges (Petition, p. 36). The district judge then stated as an additional reason for liability that in tendering the less amount of the freight charges and demanding the delivery of the goods, petitioner had exercised dominion over the shipments amounting to a qualified acceptance of the goods. The Court of Appeals, however, whose judgment is sought to be reviewed here, based its decision upon the agency and not upon the theory of qualified acceptance (Petition, pp. 38-39). It is accordingly unnecessary to examine into the soundness of the district judge's second reason. This

reason stated by the district judge forms no ground for the issuance of a writ of certiorari to review the judgment of the Court of Appeals.

Conclusion

It is respectfully submitted that, there being no basis for the writ, the petition should be denied.

Respectfully submitted,

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Of Counsel.